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No. 15-1251

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SW GENERAL, INC., DOING BUSINESS AS SOUTHWEST AMBULANCE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in preserving the balanced system of government laid out in our nation's charter, as well as the proper interpretation of laws that are relevant to that balance. Accordingly CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In June 2010, pursuant to his authority under the Federal Vacancies Reform Act, 5 U.S.C. § 3345(a)(3), President Obama named senior National Labor Relations Board (NLRB) official Lafe Solomon to serve as the Board's Acting General Counsel. In January 2011, President Obama nominated Solomon to be the NLRB's permanent General Counsel. Respondent SW General contends, and the court below held, that Solomon could not legally perform the duties of General Counsel after he was nominated to fill that position on a permanent basis. According to the court be-

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

low, the Federal Vacancies Reform Act (FVRA) prohibits any person from being both an acting officer and the permanent nominee unless he previously served as first assistant to that office. *Amicus* submits this brief to demonstrate the importance that the Framers attached to the President's ability to staff the executive branch, and to explain why the decision of the court below, which would significantly undermine the President's ability to temporarily fill an executive branch vacancy with the individual the President believes best able to fill the office permanently, is at odds with the law's text and history.

When the Framers drafted our enduring Constitution, their design sharply departed from the precursor Articles of Confederation in its creation of a strong Executive Branch headed by a single President. Under the Constitution, this new President would have sole responsibility for executing the nation's laws, but he would be aided in that constitutional obligation by subordinate officers of his choosing. As the Framers recognized, "[t]he ingredients which constitute energy in the Executive are . . . an adequate provision for its support." *The Federalist No. 70* (Alexander Hamilton); *The Federalist No. 72* (Alexander Hamilton) (recognizing that there would be "assistants or deputies of the chief magistrate" who "ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence"). Indeed, as this Court has recognized, "the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." *Myers v. United States*, 272 U.S. 52, 117 (1926). To ensure that the President has the executive support he needs, Congress has long provided that the President can temporarily fill offices until the Senate is able to

provide its advice and consent to a permanent nominee.

The FVRA is the federal law that currently governs the designation of acting officers to temporarily fill vacancies that can only be permanently filled following Senate confirmation. It provides a default rule that "[i]f an officer of an Executive agency dies, resigns, or is otherwise unable to perform the functions and duties of the office . . . the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). In addition to that default rule, it also gives the "President (and only the President)" the power to designate others to fill the position in lieu of the first assistant: (1) a person who already serves in a Senate-confirmed position, *id.* § 3345(a)(2); (2) a person who has served in a senior position (i.e., one with a rate of pay equal to the minimum for GS-15 or higher) in the agency for at least 90 days in the year preceding the vacancy, *id.* § 3345(a)(3), or (3) a person who has been nominated "for reappointment for an additional term to the same office" until the Senate confirms or rejects the nomination, *id.* § 3345(c)(1).

Subsection (b)(1) of the law—the provision at issue in this case—provides that "[n]otwithstanding subsection (a)(1) [the provision providing the default rule that the first assistant fills the vacancy], a person may not serve as an acting officer for an office under this section" if the President nominates him to fill the vacant office permanently and he "served in the position of first assistant . . . for less than 90 days" during the year preceding the vacancy. *Id.* § 3345(b)(1). In other words, the President cannot nominate someone and, at the same time, make him the first assistant, so that he automatically fills the

vacancy while his nomination is pending. By including this restriction, Congress ensured that a nominee can fill the position temporarily only if he had been previously serving in government—either because, pursuant to subsection (b)(1), he served as a first assistant for not less than 90 days during the year preceding the vacancy or because, pursuant to other provisions of the law, he was already serving in a Senate-confirmed position or was already serving in the agency in a senior position.

The decision of the court below significantly expands the limitation in subsection (b)(1), reading it to apply not just to the provision of the law actually identified in its text ("[n]otwithstanding subsection (a)(1)," 5 U.S.C. § 3345(b)(1)), but to other provisions of the law as well. This decision is at odds not only with the text of the law, but with Congress's legislative plan in enacting it. *See King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("[I]n every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.").

As the law's legislative history makes clear, the FVRA was a direct response to perceived violations of the Appointments Clause by the executive branch. *See, e.g.*, S. Rep. No. 105-250, at 5 (1998) ("the Senate's confirmation power is being undermined as never before"). Among other things, Senators wanted to prevent the President from circumventing the Senate's advice-and-consent process by nominating someone from outside the government to fill a vacancy and, at the same time, making him first assistant so that he could immediately begin performing the duties of the vacant office in an acting capacity. By imposing a length of service requirement on first as-

sistants who were also the nominee, Congress sought "to prevent manipulation of first assistants to include persons highly unlikely to be career officials." *Id.* at 13. Significantly, the provisions that allow the President to designate someone other than the first assistant to temporarily fill an office contain their own internal limitations that avoid the circumvention concern—either the person has already been confirmed by the Senate to a position in the executive branch, 5 U.S.C. § 3345(a)(2), (c)(1), or is subject to a length-of-service requirement, *id.* § 3345(a)(3). Significantly, Senator Fred Thompson, one of the key sponsors of the FVRA, made clear that subsection (b)(1) did *not* apply to subsections (a)(2) or (a)(3): "Under § 3345(b)(1), the revised reference to § 3345(a)(1) means that this subsection applies only when the acting officer is the first assistant, *and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3).*" 144 Cong. Rec. S12822 (Oct. 21, 1998) (emphasis added).

By concluding otherwise, the court below reached a decision that is not only at odds with the text and history of the FVRA, but one that would, if upheld, significantly limit the President's ability to temporarily staff important executive branch offices with the individuals that he or she believes best equipped to fill them on a permanent basis. The judgment of the court of appeals should be reversed.

ARGUMENT

I. THE FRAMERS OF THE U.S. CONSTITUTION RECOGNIZED THAT THE PRESIDENT'S ABILITY TO STAFF THE EXECUTIVE BRANCH WAS CRITICALLY IMPORTANT

Article II of the U.S. Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. The Constitution's establishment of a "single, independent Executive" was a direct response to perceived infirmities of the Articles of Confederation, which had vested executive authority in the Continental Congress, Arts. of Confed. art. IX, §§ 4, 5. *See, e.g.*, *The Federalist No. 70* (Alexander Hamilton) ("all men of sense will agree in the necessity of an energetic Executive"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 Yale L.J. 541, 599-603 (1994) ("the Constitution's clauses relating to the President were drafted and ratified to energize the federal government's administration and to establish one individual accountable for the administration of federal law"); *cf.* Akhil Reed Amar, America's Constitution: A Biography 131 (2005) ("The Constitution's 'President' . . . bore absolutely no resemblance to the 'president' under the Articles of Confederation.").

This new President was given the responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3; *Myers*, 272 U.S. at 117 (1926) ("The vesting of the executive power in the President was essentially a grant of the power to execute the laws."), and, alone among the government offices established by the new Constitution, was required to "be on duty continuously" Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Consti-*

tutional Questions, 26 Cardozo L. Rev. 377, 378 (2005); see 12 Op. Att'y Gen. 32, 35 (1866) ("it is of the very essence of executive power that it should always be capable of exercise"). Thus, unlike Congress, which was required only to "assemble at least once in every Year," U.S. Const. art. I, § 4, cl. 2, and could, on consent, adjourn as it saw fit, *id.* art. I, § 5, cl. 4, the President was always acting to execute the laws. *See* 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution 135 (Elliot ed. 1836) (contrasting Congress, who "are not to be sitting at all times," with the President, who is "perpetually acting for the public"); Amar, America's Constitution, *supra*, at 132 ("While the new Congress would go in and out of session, America itself would always be in session, as would the nation's new presiding officer.").

Given the significant responsibility with which the President was entrusted, the Framers recognized that he must have subordinate officials to aid him in executing the laws. Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 719 ("If the president is to be an effectual executive, he must have the aid of others, otherwise his power to execute the law is chimerical."). Thus, "the Constitution provide[d] for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'" *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010) (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)). Specifically, Article II expressly provided the President with the Power to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," U.S. Const. art. II, § 2, cl. 1.

As the Framers understood, "[t]he ingredients which constitute energy in the Executive are . . . an adequate provision for its support." *The Federalist No. 70* (Alexander Hamilton); *The Federalist No. 72* (Alexander Hamilton) (recognizing that there would be "assistants or deputies of the chief magistrate" who "ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence"). Indeed, this Court has long recognized that "the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." *Myers*, 272 U.S. at 117; *Free Enter. Fund*, 130 S. Ct. at 3146 (noting that officers to aid the President were necessary "[i]n light of '[t]he impossibility that one man should be able to perform all the great business of the State'" (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939))). It is thus of critical importance that the President be able to fill in a timely manner vacancies in senior executive branch positions. *See, e.g.*, Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913, 937-38 (2009) ("Vacancies in key executive agency positions have several deleterious consequences for policymaking. These effects include agency inaction, confusion among nonpolitical workers, and decreased agency accountability."); Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 Yale L.J. 940, 953-54 (2013) ("The sheer breadth of the federal government's many functions means that the President cannot perform [his] constitutional task without assistance. . Thus, the inability of the President to staff the most senior offices of the executive branch makes it extraordinarily difficult for the President to fulfill [his] constitutional function.").

Thus, while the Framers provided that the Senate should offer its advice and consent to certain presidential nominees in order to prevent abuses of power, *see Edmond v. United States*, 520 U.S. 651, 659 (1997) (noting that Senate involvement could "curb Executive abuses of the appointment power"); 3 Joseph Story, Commentaries on the Constitution of the United States § 1525 (Senate's advise-and-consent function would make the President "more circumspect, and deliberate in his nominations for office"), they also sought to ensure that the President, who would remain continually in service, could make temporary appointments even when the Senate was not available to perform its advice-and-consent function. U.S. Const. art. II, § 2, cl. 3; *see Nat'l Labor Relations Bd. v. Canning*, 134 S. Ct. 2550, 2559 (2014) ("the Recess Appointments Clause reflects the tension between, on the one hand, the President's continuous need for 'the assistance of subordinates,' and, on the other, the Senate's practice, particularly during the Republic's early years, of meeting for a single brief session each year" (internal citation omitted)). As was noted during the debates over the Constitution's ratification, if the President did not have the power to make appointments while the Senate was in recess, "such neglect may occasion public inconveniences." 4 Debates in the Several State Conventions, *supra*, at 135; *see The Federalist No. 67* (Alexander Hamilton) (noting that it "might be necessary for the public service to fill [vacancies] without delay").

Recognizing how important it was that the President be able to staff executive branch vacancies, Congress has long given the President the authority to temporarily fill vacancies while the Senate confirmation process is ongoing, albeit often subject to specified limitations. As early as 1792, the Second Con-

gress enacted a law providing for the temporary appointment of executive branch officers: "'in case of the death, absence . . . or sickness' of the Secretaries of State, Treasury or the War Department, or of any officer in those departments, 'it shall be lawful for the President . to authorize any person or persons at his discretion to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease.'" *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 210 (D.C. Cir. 1998), *superseded by statute on other grounds*, FVRA, Pub. L. No. 105-277, 112 Stat. 2681 (quoting Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281); *see also* Pet'r Br. 4. In 1863, Congress "expand[ed] the President's power to fill vacancies in 'any Executive Department of the Government,'" *Doolin, 139 F.3d at 210* (quoting Act of Feb, 20, 1863, ch. 45, 12 Stat. 656), though it restricted the President's choices in certain respects, *id.* In 1868, "Congress repealed the existing statutes on the subject of vacancies and enacted in their stead a single statute reflecting prior law," *id.*, and Congress has amended the law a number of times in the intervening years, *see id.* (discussing that history).

The FVRA is the current incarnation of that law, allowing the President to temporarily fill vacancies in senior executive branch positions, subject to certain specified limitations. By interpreting one of those limitations too broadly, the court below undermined the President's ability to temporarily fill executive branch vacancies with the individua's best equipped to fill them permanently. That interpretation of the FVRA is at odds with the law's text and history, as the next Section discusses.

II. THE DECISION OF THE COURT BELOW IS AT ODDS WITH THE TEXT AND HISTORY OF THE FEDERAL VACANCIES REFORM ACT

As its name suggests, the Federal Vacancies Reform Act was enacted to reform the procedures for temporarily filling senior executive branch vacancies that can be permanently filled only by presidential appointment and Senate confirmation. *See, e.g.*, 144 Cong. Rec. S6414 (June 16, 1998) (statement of Sen. Thompson) ("When a vacancy occurs in [an important executive branch office], it is important to establish a process that permits the routine operation of the government to continue, but that will not allow the evasion of the Senate's constitutional authority to advise and consent to nominations."); *id.* at S12861 (Oct. 21, 1998) (statement of Sen. Lieberman) (FVRA designed to "reassert[] the Senate's constitutional rights while at the same time avoid creating an unwarranted risk to the Government's good functioning").

First, the FVRA sets out a default rule, providing that "[i]f an officer of an Executive agency . . dies, resigns, or is otherwise unable to perform the functions and duties of the office . the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity . . . ." 5 U.S.C. § 3345(a)(1). Second, the law provides that "the President (and only the President)" may "notwithstanding [the default rule set out in § 3345(a)(1)]," direct someone else to temporarily fill the position: (1) a person who already serves in a Senate-confirmed position, *id.* § 3345(a)(2); (2) a person who has served in a senior position (i.e., one with a rate of pay equal to the minimum for GS-15 or higher) in the agency for at least 90 days in the year preceding the vacancy, *id.* § 3345(a)(3), or (3) a person

who has been nominated "for reappointment for an additional term to the same office" until the Senate confirms or rejects the nomination, *id.* § 3345(c)(1).

The law also provides a limitation on the circumstances in which the first assistant can temporarily fill the vacancy, providing that "[n]otwithstanding subsection (a)(1) [the default rule that the first assistant fills the vacancy], a person may not serve as an acting officer for an office under this section" if the President nominates him to fill the vacant office permanently and he "served in the position of first assistant" for less than 90 days during the year preceding the vacancy. *Id.* § 3345(b)(1). In other words, the President cannot nominate someone and, at the same time, make him the first assistant, so that he automatically fills the vacancy while his nomination is pending. This restriction does not apply if the person nominated "is serving as the first assistant to the office of an officer described under subsection (a)" and that first-assistant position is itself an office to which the individual has been confirmed by the Senate. *Id.* § 3345(b)(2).

Respondent argues, and the court below held, that the limitation in subsection (b)(1) does not simply limit the circumstances in which a *first assistant* can temporarily fill the office if he or she has also been nominated to fill it permanently. Instead, according to the court below, subsection (b)(1) also limits the circumstances in which the President can name *anyone* to fill the vacancy temporarily if the President has also chosen to nominate that person to fill the position permanently. This conclusion, which would prevent some career officials "from serving [temporarily] if the President also regarded them as most qualified to occupy the . . . position at issue on a

permanent basis," Pet'r Br. 23, is at odds with the text and history of the law.

To start, the relevant limitation in subsection (b)(1) applies, by its terms, only to subsection (a)(1), which governs when first assistants automatically fill the vacancy. *See* 5 U.S.C. § 3345(b)(1) ("[n]otwithstanding *subsection (a)(1)*, a person may not serve as an acting officer . . " (emphasis added)). In other words, subsection (b)(1), like subsections (a)(2) and (a)(3), operates as an exception to the default rule: even if the President does not direct someone else to fill the vacancy pursuant to (a)(2) or (a)(3), the first assistant cannot fill the vacancy if the President has nominated him to fill the office permanently *and* he served as first assistant for less than 90 days in the year preceding the vacancy, unless subsection (b)(2) applies. Had Congress wanted subsection (b)(1) to apply to all three mechanisms for temporarily filling a vacancy set out in subsection (a), it could easily have said so by providing that "[n]othwithstanding *subsection (a)*, a person may not serve as an acting officer" if the specified conditions exist.

That Congress wrote the law in the way that it did makes complete sense because that text, read naturally, accomplishes exactly what Congress set out to do when it enacted the FVRA. *King*, 135 S. Ct. at 2496 ("[I]n every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan."). As the legislative history of the FVRA makes clear, the FVRA was a direct response to perceived violations of the Appointments Clause by the executive branch. *See, e.g.*, S. Rep. No. 105-250 (1998) ("the Senate's confirmation power is being undermined as never before"); 144 Cong. Rec. S6413 (June 16, 1998) (statement of

Sen. Thompson) ("This legislation is needed to preserve one of the Senate's most important powers: the duty to advise and consent on presidential nominees. . . [T]he Vacancies Act is honored more in the breach than in the observance.").

Among other things, members of the Senate objected to the fact that an individual who the Senate had refused to confirm to the position of Assistant Attorney General was allowed to effectively fill the office anyway as a temporary appointee. *See* O'Connell, *supra*, at 933 ("Frustrated by President Clinton's reliance on temporary appointees, including Bill Lann Lee as head of the Department of Justice's Civil Rights Division, congressional Republicans pushed through the Federal Vacancies Reform Act of 1998."); *see also* 144 Cong. Rec. S11028 (Sept. 28, 1998) (statement of Sen. Thurmond) ("Most recently, the President installed Bill Lann Lee as Acting Chief of the Civil Rights Division in blatant disregard of the Judiciary Committee's decision not to support his controversial choice. Mr. Lee has been serving as Acting Chief for ten months, and the President apparently has no intentions of nominating someone the Judiciary Committee can support."); *cf. id.* at S11033 (statement of Sen. Leahy) (urging the Senate to vote on Lee's nomination).[2]

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[2] Other concerns that motivated enactment of the FVRA included the fact that "[s]ince 1973 the Department [of Justice] ha[d] continued to make acting appointments outside the strictures of the Vacancies Act," 144 Cong. Rec. S11021 (Sept. 28, 1998) (statement of Sen. Thompson); *see also id.* at S11028 (statement of Sen. Durbin) ("There has been flagrant and contagious disregard for the application of the existing law as the sole mechanism for temporarily filling advise and consent positions while awaiting the nomination and confirmation of the official candidate."), and the issuance of a D.C. Circuit decision holding that the Vacancies Act did not "specify when the President must

To address that problem, the FVRA was designed to prevent the President from circumventing the Senate's advice-and-consent role by nominating someone from outside government to fill a vacancy and, at the same time, making him first assistant so that he could immediately begin performing the duties of the office in an acting capacity. Congress believed that imposing a requirement on "the length of service of the first assistant eligible to be both the nominee and the acting officer" would "prevent manipulation of first assistants to include persons highly unlikely to be career officials." S. Rep. No. 105-250, at 13. And that is exactly what subsection (b)(1) does—imposing a length of service requirement on first assistants who are also nominated to fill the post permanently. Notably, subsections (a)(2) and (a)(3) did not present the same concern as subsection (a)(1) because they contained their own internal limitations that prevented their use as a means of circumventing the advice-and-consent process. Subsection (a)(2) applies only when an individual has already been confirmed by the Senate, and subsection (a)(3) includes its own requirement that the senior agency official have been serving in the position for at least 90 days during the year preceding the vacancy.

Significantly, an early version of the FVRA (the one that was voted out of the Senate Committee) contained provisions substantively parallel to subsections (a)(1) and (a)(2), that is, a default provision under which the first assistant automatically filled the vacancy and another provision under which the President could designate an individual who had been Senate-confirmed to a different position. The text of

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undertake the filling of [a] position," S. Rep. No. 105-250, at 6; *see* Pet'r Br. 6-7.

that earlier version left absolutely no doubt that the limitations on service by individuals who were nominated to fill the position permanently applied only to first assistants, not to individuals holding Senate-confirmed positions, S. Rep. No. 105-250, at 25, as the court below acknowledged, *see* Pet. App. 19a (noting that the earlier version "of subsection (b) manifestly applies to first assistants only"). So far as *amicus* is aware, nothing in the FVRA's legislative history suggests that subsequent amendments to the bill were intended to expand that limitation to apply beyond first assistants. To the contrary, subsequent amendments to the bill were intended to give the President *more* flexibility, not less, in determining who should fill vacancies on a temporary basis. Specifically, some Senators suggested "allow[ing] a third category of individuals to temporarily fill positions, such as . . . qualified individuals who have worked within the agency in which the vacancy occurs for a minimum number of days and who are of a minimum grade level," S. Rep. 105-250, at 31, and they urged that "the length of service requirement for first assistants who are nominees . . . be reevaluated," *id.*; *see* 144 Cong. Rec. S11027 (Sept. 28, 1998) (statement of Sen. Levin) ("the bill restricts who can be an acting official . to a first assistant or another advice and consent nominee. That is too restrictive a pool of acting officials and does not give this administration, or any administration, the ability to make, for instance a long-time senior civil servant within the agency an acting official"); *id.* at S11032 (statement of Sen. Glenn) ("I intend to offer an amendment to add a third category which would include qualified individuals of a certain level or higher who are already within an agency in which a vacancy occurs. . . This gives the President a larger pool from which to choose an acting official . . . "); *id.* ("I hope to offer an

amendment which would further decrease the requirement for a first assistant who will be an acting officer and the nominee to 45 days."); *id.* at S12861 (Oct. 21, 1998) (statement of Sen. Lieberman) ("I am particularly pleased that the final version of the bill resolves one of my biggest concerns—that we not define who may serve as an acting official in a manner that, in some cases, effectively precludes anyone from serving in an acting capacity. The final version of the bill well addresses this problem by offering the President the option to choose any senior agency staff who has worked at the agency for at least 90 days to serve as the acting official.").

The version that was ultimately enacted into law addressed these concerns. First, subsection (a)(3) was added to allow for the designation of long-serving senior agency officials. *Id.* at S12822 (Oct. 21, 1998) (statement of Sen. Thompson) ("[a] third category of 'acting officer' is now permitted apart from first assistants and presidentially designated persons who have already received Senate-confirmation to hold another office"). As Senator Thompson explained, this change addressed "[c]oncerns . . . that, particularly early in a presidential administration, there will sometimes be vacancies in first assistant positions, and that there will not be a large number of Senate-confirmed officers in the government" and that it might be problematic to "designat[e] too many Senate-confirmed persons from other offices to serve as acting officers in additional positions." *Id.* Second, subsection (b)(1) was amended to reduce the time-in-service requirement for first assistants. *Id.* ("The 180 day period in § 3345(b) governing the length of service prior to the onset of the vacancy that the first assistant must satisfy to be eligible to serve as the acting officer is reduced to 90 days.").

As the government argues, it makes little sense to think that these amendments that were adopted to give the President *more* flexibility in his choice of acting officers also expanded the *restriction* in subsection (b)(1) on serving as an acting officer after being nominated, so that the restriction would apply not only to first assistants, but also to persons designated by the President pursuant to subsections (a)(2) and (a)(3). Pet'r Br. 40 ("Under the court of appeals' view, Congress expanded the categories of officials eligible for acting service to [ensure the most qualified individual fills the position] . . but then imposed a requirement in Subsection (b)(1) that would essentially disqualify such officials from serving if the President concluded (as he did in this case) that such an official was so highly qualified that the official would also be the appropriate permanent choice."). Moreover, of great relevance here, in explaining these changes, Senator Thompson made clear that the limitations in subsection (b)(1) only applied to first assistants who automatically assumed the position of acting officer pursuant to subsection (a)(1): "[u]nder § 3345(b)(1), the revised reference to § 3345(a)(1) means that this subsection applies only when the acting officer is the first assistant, *and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3).*" 144 Cong. Rec. S12822 (Oct. 21, 1998) (statement of Sen. Thompson) (emphasis added).[3]

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[3] The court below discounted the significance of this statement, noting that "Thompson was immediately contradicted by Senator Byrd Byrd's statement hewed much more closely to the statutory text and suggested that subsection (b)(1) applies to all categories of acting officers. Thus the floor statements are a wash." Pet. App. 17a-18a. But the statement of the prime sponsor of the legislation—the sponsor who made the relevant amendment to the legislation (144 Cong. Rec. S10996 (Sept. 25, 1998) (statement of Sen. Thompson)) and who was specifically

In sum, the FVRA was enacted to prevent circumvention of the Senate's role in providing advice and consent to the President's executive branch nominees, while also ensuring that the President has sufficient flexibility to temporarily fill those offices until the Senate can provide its advice and consent. Properly interpreted, it does exactly that. The decision of the court below, however, is at odds with the statute's text, as well as Congress's legislative plan in enacting it. Moreover, it would undermine the President's ability to temporarily staff important executive branch offices with the individuals that the President believes best equipped to fill the vacancies on a permanent basis. That decision should not stand.

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explaining the effect of that amendment and how the amended provision would operate—should not be so lightly dismissed simply because of Senator Byrd's imprecise paraphrasing of the statute's text in the context of giving a more general overview of the bill. Indeed, Senator Byrd's paraphrasing of the text was imprecise in another respect, as well. Senator Byrd stated that a person had to be first assistant *at the time of the vacancy*, whereas the statute clearly provides that the person need only have served as first assistant during the year preceding the vacancy. *Compare* 144 Cong. Rec. S12824 (Oct. 21, 1998) (statement of Sen. Byrd) ("a person may not serve as an acting officer if: (1)(a) he is not the first assistant, or (b) he has been the first assistant for less than 90 of the past 365 days, and has not been confirmed for the position; and (2) the President nominates him to fill the vacant office"), *with* 5 U.S.C. § 3345(b)(1) ("a person may not serve as an acting officer if—(A) during the preceding 365-day period preceding [the vacancy], such person (i) did not serve in the position of first assistant to the office of such officer; or (ii) served in the position of first assistant to the office of such officer for less than 90 days; and (B) the President submits a nomination of such person ").

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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